PalArch's Journal of Archaeology of Egypt / Egyptology

BALANCED LEGAL PROTECTION, DEBTORS, CREDITORS, AND INTERESTED PARTIES IN BANKRUPTCY

Bernard Nainggolan

Faculty of Law, Universitas Kristen Indonesia, Jakarta, Indonesia

bernard.nainggolan@uki.ac.id

Bernard Nainggolan Balanced Legal Protection, Debtors, Creditors, And Interested Parties In Bankruptcy-- Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(4), 1799-1808. ISSN 1567-214x

Keywords: Debtors, Creditors, Bankruptcy, Legal Protection, Commercial Court

ABSTRACT

The background of the bankruptcy institution's presence was mainly due to the purity of the economy after the monetary crisis. The bankruptcy cannot actually be regarded as a death knell for bankrupt debtors and loses everything for creditors and other stakeholders. This hypothesis is an ideal desire from the Bankruptcy Law that applies in a country. Finally, it is necessary to find a fundamental cause, namely whether the legislator has seriously considered all aspects on its development. The principle of legal protection is not necessarily realized in the substance, Creditors, Debtors, and other parties who do not achieve an adequate protection. The economic actors does not necessarily assume that the bankruptcy institutions are the best solution in solving debt problems. This resulted with low bankruptcy requests being submitted to the Commercial Court compared to the number of problems with debts or bad loans that occurred in the community.

INTRODUCTION

Due to the monetary fluctuations that effect Indonesia since mid-1997, the national economic conditions became very difficult. The performance of the business world is largely stagnant, even some are bankrupt. According to data from the Business Law Journal [1], there were around 18,000 companies experiencing difficulties in repaying debts that were due and billed due to the 1997 financial crisis. The problem was that the rupiah exchange rate against the US dollar were drop, the government and the private debt (using US dollar standards) becomes swollen. To overcome and anticipate the situation, one of the government's steps (especially concern the debts of the world business) has issued Perpu No. 1 of 1998 about an Amendments to the Law on Bankruptcy. The impact of the monetary crisis has triggered a freeze between business and banking, leading to a debt bondage that has made the world business practically

paralyzed. The step of saving the world business through the debt scheduling and restructuring has been attempted through the Indonesian Debt Restructuring and the Jakarta Initiative. However, it is not entirely acceptable to foreign creditors. So, another method to solve the debt-debt problem effectively which their essence is to return the amount of credit to creditors in a fast, efficient, balanced, and transparent.

In the past (before the 1998 UUK was made), according to Sudargo Gautama bankruptcy was less popular. The problem is, in practice the distribution of assets of parties that are declared bankrupt to creditors is unsatisfactory. So that if there is a debtor experience with bad credit and look for bankruptcy, it will be strongly opposed by the creditors [2]. In line with Gautama, as Professor at the University of Indonesia and also Supreme Court Justice, Paulus Effendie Lotulung, admitted that in practice and reality, there were not many bankruptcy cases brought to the court. In the period of several decades before 1998, the bankruptcy cases were rarely submitted to the court and in the recent years there were only about 20 bankruptcy cases submitted to the Jakarta District Court. Moreover, In the West Jakarta District Court (from 1984 to 1991), there were only 2 bankruptcy cases were handled [3].

Before the enactment of UUK 1998, the economic actors estimated that at least 18,000 companies in Indonesia would be subject to the bankruptcy procesess. In fact, after a year of the used of the UUK 1998, bankruptcy cases were no more than 100 bankrupt applicants and from the 1998-1999 statistical data, there were only 29% of bankruptcy applications were granted [4]. Whereas according to data compiled by Hermayulis (from September 1998 to August 2001) the number of cases in the Commercial Court was only 273 cases, and from that cases there were 116 cases continued to the cassation, and there were 60 cases on judical review [5]. A curator mentioned that the value of debt recovery commonly achieved in the bankruptcy process was only an average of 11.6% of the value of the principal debt. This value clearly does not show satisfactory results for creditors, so that many creditors are shocked and disappointed with the outcome of the bankruptcy process [6]. The Bankruptcy for a large company will have a huge social effect. A good Bankruptcy Law must be based on the principle of providing balanced protection for all involved parties and concerned with the bankruptcy of a person or company [7]. The word legal protection indicate the meaning that the law protects something. Something that protected by law is human interest, since the law is made by and for humans or society [8]. For this reason, it is necessary to regulate and create provisions on how a person must act or not act so that the human interests are protected, with sanctions to be guaranteed, so that legal norms are needed.

Soerjanto Soekanto and Sri Mamudji [9-14], stated, that physically the human being is a harmonious organism, whereas spiritually human being are guided by three principles which producing certain desires namely: enjoyment, reality, and harmony. In the reality of human life the principle of enjoyment and the principle of reality are antinomy. Therefore, the desire for freedom and the desire for the discipline are controlled by the desire for harmony. Etymologically, the term bankruptcy comes from the Dutch word that is failliet,

which has a double meaning as a noun and as an adjective. In countries with English native speaking, the same terms are used for bankrupt and bankruptcy terms [15-18]. From some descriptions of the above definition, it seems that the interests of creditors are to be protected by regulations or bankruptcy law. If the debtor fails to pay his debts or the debtor do a certain actions that tend to deceive his creditor then the court decision on the debtor is declared bankrupt. As a result, his assets were confiscated and used to pay his debts to creditors.

The mission of bankruptcy law which was originally a means of debt collection, turned out into a monster that seemed to be ready to suck the blood of the debtor (who is naughty or honest). In fact, many people have appreciated that the threat of bankrupting a debtor is far more effective than a debt colector [19]. Thus, the bankruptcy law (which was originally very rarely used and has been stored in museums) with supported by the effect of the Law Number 4 of 1998 then became very widely used and become a daily sight in the commercial court. Like the swordsman who had long been meditating and then descended the mountain to fight to overcome injustice [19]. Viewed from the point of view of his birth, due to the insistence of foreign creditors and the IMF, it is no exaggeration to say that the 1998 Bankruptcy Regulation is more inclined to protect the interests of creditors. From the eleven principles presented by Sjahdeini that should be included in the UUK, the authors generally agree, except for one principle, namely principle number 1, UUK must be able to encourage the excitement of foreign investment, encourage capital markets, and make it easier for Indonesian companies to obtain foreign credit. The reason, because for those things, there many factors are needed, such as conditions of security, political stability, law enforcement, and so on.

In this paper, the use of bankruptcy institutions and the application of legal protection principles in bankruptcy will be analyzed and elaborated. This analysis is divided into four parts, first: about the use of bankruptcy institutions since the UUK 1998 to UUK 2004; Second: the application of the formation principle of the of laws and regulations in the bankruptcy which reviews the extent to which the principles of the formation of legislation according to the P3 Law color UUK; Third: concerning the application of legal principles and specific legal principles in UUK; and fourth: concerning the application of the principle of justice in the operation of bankruptcy law or UUK.

METHOD:

Legal Protection for those with an interest in the bankruptcy

Based on data from the Niaga court of the Central Jakarta, around seven years since the renewal of the UUK in 1998, there were only 405 bankruptcy cases entered the Central Jakarta Commercial Court. This number is far below the estimates of economic actors in 1998 (before the enactment of UUK 1998), that if the 1998 UUK is implemented there will be at least 1.800 (one thousand and eight hundred) companies in Indonesia that will be subject to bankruptcy procesess. The estimate number is based on the fact that since the monetary crisis attack Indonesia in 1997 there were thousands of companies (debtors)

who defaulted on their debts to creditors. With only 405 bankruptcy requests entering the Commercial Court in about seven years, it is estimated that thousands of corporate debtors experiencing bad credit can explain that creditors and debtors do not necessarily choose bankruptcy institutions as a way to resolve debts that have problems. Then, from 405 bankruptcy cases that entered the Commercial Court, only 134 requests (around 33%) were granted, 128 requests (about 31%) were rejected, while the rest were decided to be unacceptable, aborted, revoked, and peaceful. This data explains that even though the bankruptcy requirement according to UUK 1998 and UUK 2004 has been so modest, it turns out that the Commercial Court did not easily grant the bankruptcy request. It is interesting from the data on the development of bankruptcy application, that every year since 1999 the number of bankruptcy applications that entered the Commercial Court decreased consistently.

The law serves as a protection of the human interests. In order for the human interests to be protected, the law must be implemented. The implementation of the law can take place normally, peacefully, but can also occur due to violations of the law. Conceptually, the core and the meaning of the law enforcement lies in harmonizing the relationships of the described values in the solid and manifest principles that are act as a series of final stages of value translation, to create, and maintain the peace of life. The factors that influence and the effectiveness of the law enforcement benchmark are [20]: the legal factors itselves; the law enforcement factor (namely parties that form or apply the law); The facilities factors that support the law enforcement; the community factors (namely the environment in which the law applies or is applied); and cultural factors (namely as a result of work, creativity, and a sense based on human intentions in the relationship of life).

Then, it should be known that in enforcing the law there are three elements that must be considered, namely legal certainty, usefulness, and justice. The legal certainty is related to the implementation of the law as it cannot be deviate. The legal certainty is a justification of protection against arbitrary actions, which means that someone will get something expected under certain circumstances. The community expects the legal certainty, because with the existence of the legal certainty the people will be save and orderly. The law is in charge of creating legal certainty because it aims at public order. Benefit as an element of law enforcement departs from the idea that the law is for humans, so the implementation or enforcement must provide benefits or usefulness for the community. It should be avoided so that the law implementation and enforcement itself does not create restlessness or cause disadvantage to the community. Justice is something that is highly coveted from law enforcement. However, it must be realized that the justice is subjective, not the same for everyone, but nevertheless, law enforcement must pay attention to the justice.
The law of a nation is like an open book, which is easy to read by anyone. This situation has a consequence, that it is difficult for a nation to hide the facts contained in its legal life. Correspondingly, to assess whether law enforcement in Indonesia is good or still bad, it can be indicated by common facts. On the streets there are many traffic violations and the solution is done only between the police and traffic violators. On the side of the streets, we will easily find

many traders who freely sell voice recording and pirated cinematography products. If now, there is a new phenomenon that many officials are being dragged into jail for corruption cases, it does not mean that lately many officials are corrupt. After the reform era (1997), even though the country and government conditions began to improve, which is marked by the beginning of the development of a democratic situation, this did not necessarily affect the performance of law enforcement. That is, law enforcement since the reform era is still bad. This is suspected because the government in Indonesia has a huge influence on law enforcement institutions.

A myriad of problems have stain the implementation of the Bankruptcy Regulation, for example the consistency problem of the judges in interpreting the provisions of the Bankruptcy Regulation. The study results show that opinions variations in between assemblies reach extraordinary levels. Different council at the same level can take opposite positions. A debt debt case is being tried at the Commercial Court as request of a creditor, but the same case a public court can be held where the debtor sues the creditor. Strangely, the Commercial Court's decision is contrary to the public court decision. Many curators appointed by the court can only bite their fingers, either because they do not gain access to claim to bankrupt assets, but also because debtor assets have been taken away by irresponsible parties. There is a bankrupt debtor who is not at all concerned with the court's decision that has bankrupted him, so that his property is never subject to public confiscation. All these events show that bankruptcy law enforcement is still far from what is expected, because it does not apply the three elements of law enforcement, namely legal certainty, benefit, and justice. The Bankruptcy law enforcement is clearly still not able to protect the interests of parties with good faith.

Analysis of the Application of Legal Protection Principles for Creditors and Debtors in the Bankruptcy Law

The principle of law protection is a general theorem applied in the framework of the functioning of the law to protect the human interests and in the context of achieving the law objectives (ie an orderly society and human interests in society will be protected). To gain an understanding of the principle of the law protection in bankruptcy, the author has explained various types of principles in the scope of law namely: the principle of the legislation regulations, the principle of law, the principle of justice, and the principle of special bankruptcy or bankruptcy principles. This legal principle is the heart of the law regulations. It is the most extensive foundation for the birth of a law regulations and it also deserves to be called the reason for the birth of the law regulations [21]. So, if we talk about the application of the principle of law protection in UUK, we should consider about the law principles are contained in UUK that are essentially to protect the interests of creditors and debtors, as well as the interests of various parties related to the bankruptcy.

In UUK which contains material law and formal law there are provisions that contain the principle of justice. However, when talking about the application of the principle of justice in the bankruptcy, the main thing to be seen is how to

apply the principles of justice in the bankruptcy process, bankruptcy decisions, and bankruptcy decisions. So, the point is the operational law of bankruptcy itself, not just the inclusion of the principles of justice in the UUK. After outlining the research data, both from library research and field research, the writer now comes to the analysis of the use of the bankruptcy institutions and the application of the principle of law protection in the bankruptcy. This analysis is divided into four parts, first, about the use of bankruptcy institutions since the 1998 UUK to UUK 2004; second, the application of the principle of the formation of laws and regulations in bankruptcy which reviews the extent to which the principles of the legislation regulations according to the P3 Law which tint to the UUK; third, concerning the application of the law principles and the specific law principles in the UUK; and fourth, concerning the application of the principle of justice in the operation of the bankruptcy law or UUK. The facts in the court often cannot be read about when the start and the end, as well as negative rumors about the judicial mafia. This makes justice seekers, especially the business man, investors, or foreign creditors give signals and pressure to the government (either through the presence of the IMF or through reluctance to conduct business activities in Indonesia) to immediately respond to the desire for a court to be able to resolve business cases, particularly the debt issues in fair, fast, open and effective manner.

Since the beginning of the enactment of the UUK in 1998, it has taken place sparking debate in the realm of potential public issues. First, it involves philosophy. There is an assessment that the bankruptcy regulations does not have a clear concept for providing fair law protection to debtors and or creditors, as well as related parties. In terms of the interests of the debtor, the 1998 UUK seems to direct the debtor who is unable to pay his debts to the liquidation option rather than giving the debtor an opportunity to improve his company's performance. In fact, the bankruptcy does not only concern the interests of debtors and creditors, but also relates to the interests of many parties, such as employees, shareholders, the government, and others. Regarding the substance of the UUK 1998, there are things that are less clear in their arrangement so that they lead to the various interpretations or even a void of regulations to solve them. For example, the 1998 UUK does not provide an understanding or definition of debt, debtors or creditors. This not only triggers debate among legal experts and legal practitioners, but also raises problems in the law enforcement. Therefore, it is not surprising that then several commercial court rulings smelled of controversy and were deemed not to provide justice as expected. The second problem in the implementation of the 1998 Law is the effectiveness of the bankruptcy institutions to resolve debt-related issues. A curator mentioned that the value of debt recovery commonly achieved in the bankruptcy process was only an average about 11.6% of the principal debt value. This value clearly does not show satisfactory results for creditors, so that many creditors are shocked and disappointed at the results of the bankruptcy process. Finally, many creditors does not want the bankruptcy of their debtor.
Based on the results of direct research by the author, that in about seven years since the renewal of the UUK in 1998, there were only about 405 bankruptcy cases entered the Central Jakarta Commercial Court. This number is far below the estimates of the economic actors in 1998 as mentioned above. The study

results indicate that there is a tendency to decrease public interest in using the bankruptcy institutions as a means of settling debts. This is according to the author's analysis due to two things: first, in fact the rate of return on accounts receivable through the bankruptcy settlement is very low. The value of debt recovery commonly achieved in the bankruptcy process which only averaged 11.6% of the value of the principal debt clearly did not show satisfactory results for creditors. Second, in fact, even though the conditions for applying for bankruptcy are quite simple, it is not easy to the bankrupt creditors. The above data shows that out of 405 bankruptcy cases that entered the Commercial Court, only 134 applications (around 33%) were granted. These data clearly affect the minds of creditors who refuse to bankrupt their debtors.

The background that underlies the birth of the UUK 1998 is to accommodate the wishes of creditors. According to the birth process, it can be said that the UUK 1998 contains several weaknesses, namely: the 1998 UUK was born not because of the urging of the community, but because of pressure from foreign creditors and the IMF; Indonesia was forced to give birth to a law that was suddenly not for the benefit of the community, this could be said to have hurt the dignity of the nation and state. The UUK 1998 can be said to be unfair for the people of Indonesia. This study shows that in the implementation of the UUK there are many different interpretations of the formulation of the articles of the UUK. Therefore, there are not a few problems in the bankruptcy field that are essentially the same as being differently decided by different judges. It also shows that the UUK does not fulfill the principle of the formulation clarity as a good legislation regulations.

Based on the review on the seven principles for the establishment of good legislation regulations, there were only three principles were met in the formation of the UUK 2004 , namely: (i) appropriate institutional or organizing principles; (ii) The principle of adjustment between type and material of charge; and (iii) Principles of efficacy and usefulness. While the four other principles which are not fulfilled, namely: (i) Principle of clarity of purpose; (ii) Principles can be implemented; (iii) The principle of formulation clarity; and (iv) principles of openness. Furthermore, out of the eleven principles presented by Sjahdeini, only six principles can be referred as special law principles in the area of the bankruptcy, namely: the principle of balanced protection, the principle of approval of the creditors majority, the principle of eligibility for the bankruptcy, the principle of standstill or stay, the principle of prioritizing privileges and the principle of ultimum remedium.

Judicial principles are the basic principles in the administration of justice or judicial power. In essence, the principles of justice are included in the law that regulates judicial power. However, the laws which regulate certain fields and at the same time contain the procedural law there are times when several judicial principles are stated. The application of the four principles of justice in the UUK 2004 can be described in the **Table 1.**

Table 1. Inclusion of the Judicial Principles in the UUK

Judicial principles	Included in the clause	Eexplanation
1. Simple, fast, and low cost of the principle of justice.	Clause 6 verse(2), (4), (5), (6), and (7), clause 8 verse(2), (5), clause 9, verse 11 verse(1) and (2), clause12 verse (1), (2), (3), (4), clause 13 verse (1) , (2), (3), 6) and (7), clause 8 verse (4), clause 11 verse (1), clause 14 verse (1), clause 225 verse (2) and (3), clause 228 verse (6)	The examination process and decision making regarding the bankruptcy requests are brief and simple. But the judiciary regarding the bankruptcy petition does not include the judiciary that applies a small fee. The costs that must be borne by the parties may be too large.
2. The open trial principle for the public	Clause 8 verse (7), clause 18 verse (2), clause 15 verse (4), clause 17 verse (1), clause 19 verse (1)	The trial of the application for a bankruptcy statement is open to the public. Moreover, the decision of the bankruptcy statement was announced in the State Gazette and in the newspapers; as well as the decision to declare the bankruptcy.
3. The principle of the parties is given the opportunity to defend by themselves	clause 8 verse (1) and (2)	The debtor will be called if the bankruptcy application is proposed by the creditor, and the creditor can be called if the bankruptcy application is proposed by the debtor. Of course, the information from the parties will be asked and given the opportunity to provide a rebuttal.
4. The decision principle with the reasons	Clause 8 verse (6), clause 13 verse (4)	The quality of the judge's decision is highly determined by the reasons for the decision. The decisions on bankruptcy statements are required with the reasons, both legal basis and facts.

The essence of the application of the principle of justice in bankruptcy is actually not a matter of including or not including the principles of justice in the UUK, but how the process of the black courts runs, whether it is in accordance with the principles of justice or not. Except for the fast judicial principles, the time limits need to be set for the stages in the bankruptcy process, in fact it is not too urgent to include judicial principles on the UUK. The most important is how judicial officers understand and want to implement the principles of justice as stated in the law that regulates judicial power as described above.

CONCLUSIONS

At the beginning of the recognition of bankruptcy institutions, the principle of legal protection is only used for the benefit of creditors when the debtor is negligent, unable, and or does not want to pay their debts. However, it was realized that the interests of the debtor also need protection. In this modern era, the bankruptcy law in various countries, including in Indonesia, has laid the foundations of balanced protection between the interests of creditors and debtors. In the formation of the UUK 2004, there seemed to be a desire to accommodate the interests of various parties with an interest in the bankruptcy, namely the interests of creditors, debtors, the general public with an interest in the bankruptcy, even the interests of the nation and state. However, from the research results of the author shows that the law norms in the UUK 2004 have not fully applied the principles of the law protection which is needed in order to provide fair protection for the parties associated with the bankruptcy.

The Bankruptcy institutions as regulated in the UUK 1998 and later amended with the UUK 2004 were originally expected to be effective by means of resolving the debts problem between the creditors and the debtors. In the fact, the economic actors did not necessarily consider the bankruptcy institutions as the best solution in solving the debt problems. This resulted in very few bankruptcy requests being submitted to the Commercial Court compared to the number of problems with debts or bad loans that occurred in the community. In addition, there is a tendency that the bankruptcy applications that enter the Commercial Court from year to year are decreasing, which indicates that the public interest in utilizing the bankruptcy institutions is also decreasing.

REFERENCES

K. Gratzer and D. Stiefel, History of Insolvency and Bankruptcy from an International Perspective, Södertörns högskola 2008..

Sudargo Gautama, Comments on Bankruptcy Regulations, PT. Citra Aditya Bakti, Bandung, 1998, hlm. 2

M. Marincˇ and R. Vlahu, The Economics of Bank Bankruptcy Law, DOI 10.1007/ 978-3-642- 21807-1_2, # Springer-Verlag Berlin Heidelberg 2012.

H.P. Panggabean, Tanggapan Terhadap Persepsi Negatif Masyarakat Mengenai Pengadilan Niaga dan Putusan-putusannya, Ibid, hlm. 43.

Acharya, V., & Subramanian, K. (2009). Bankruptcy codes and innovation. Review of Financial Studies, 22, 4949–4988.

Acharya, V., Bharath, S., & Srinivasan, A. (2007). Does industry-wide distress affect defaulted firms? Evidence from creditor recoveries. Journal of Financial Economics, 85, 787–821.

S. R. Sjahdeini, Hukum Kepailitan, Memahami Faillissement-verordening Juncto Undang-undang No. 4 Tahun 1998, PT. Pustaka Utama Grafiti, Jakarta,2002, hlm. 43.

S. Mertokusumo, Bunga Rampai Ilmu Hukum, Penerbit Liberty, Yogyakarta, 1984, hlm. 107.

T. R. Tyler, Methodology in Legal Research, Utrecht Law Review, vol. 7, no. 3, 2017.

A. Hamid S. Attamimi, Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara, Disertasi, UI, Jakarta, 1990, hlm. 299.

E. G. Rendell, Pennsylvania's New Right to Know Law, The General Assembly of the Commonwealth of PenNsylvania, February 14, 2008.

Mark Tushnet, A Critical Legal Studies Perspective, Law Journals, 38 Clev. St. L. Rev. 137, vol. 38, no. 1, 1990.

H. R. Syahrani, Summary of the Digest of Law, PT Citra Aditya Bakti, Bandung, 2004, hlm. 156.

A. Hamid S. Attamimi, Peranan Keputusan Presiden Republik Indonesia dalam hlm. 299.

G. Germain, Bankruptcy Law And Practice, Syracuse University College of Law, CALI eLangdell Press 2016.

Black, Hendry Campbell, Black's Law Dictionary, St. Paul, Minnesota, USA, West Publishing Co., 1968, hlm. 186.

Munir Fuady, Hukum Pailit 1998, dalam Teori dan Praktik, Citra Aditya Bakti, Bandung, 2002, hlm. 8.

Sutan Remy Sjahdeini, Hukum Kepailitan, Memahami Faillissement-verordening Juncto UU Nomor 4 Tahun 1998, Pustaka Utama Grafiti, 2002, hlm. 15.

Fuady, Munir, Hukum Pailit 1998 dalam Teori dan Praktik, PT Citra Aditya Bakti, 2002, hlm. 2.

W. Tengpongsthorn, Factors affecting the effectiveness of police performance in Metropolitan Police Bureau, Kasetsart Journal of Social Sciences, vol. 39, no. 1, pp. 39-44, 2017.

Susan S. Silbey, Law and Science: Epistemological, Evidentiary and Relational Engagements, Ashgate, Massachusetts Institute of Technology, USA, vol. 1, 2008.